No. 12330

In The

United States Court of Appeals

For the Ninth Circuit

STANDARD INSURANCE COMPANY,
a corporation, *Appellant*

vs.

MABLE E. WISTING, *Appellee*

Reply Brief of Appellant

On Appeal from the United States District Court
for the District of Oregon

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ARGUMENT

Appellee in her brief insists that Appellant's opening statement is an inaccurate account of the method used by the Company in computation of the amount of the loan which was dated October 25, 1946. The appellant's explanation is the one given by the officers of the Company who made the calculation, and it is submitted that it is correct. However, the variance in this regard is immaterial, because

the rights of the Appellee rest upon the written contracts consisting of the policy of insurance and the policy loan agreement of October 25, 1946. We can therefore start from this premise, that there was a policy loan against the policy in question amounting to $1394.00 upon which interest accrued from October 25, 1946.

Next we wish to point out, that throughout Appellee's brief it is assumed or stated that Appellant seeks to avoid the policy by foreclosure of the loan without thirty-one days' notice. See the following statements in Appellee's Brief: on Page 4:

> "No notice of any charge of accrued interest before it became due was given to the insured."

Again on the same page:

> "In the absence of notice to deceased it would be unjust to permit the Company to put a different interpretation on 'indebtedness' for the purpose of lapsing the policy."

On Page 5 Appellee quotes from Finding XXIV:

> "That defendant did nothing to attempt to foreclose the policy under the provisions of the loan agreement, particularly Paragraph III."

At the top of page 8 Appellee concludes:

> "* * * it in effect terminated the policy by foreclosure without notice."

At page 16 Appellee quotes the foreclosure provision of the policy loan agreement and concludes:

> "* * * it was necessary for the Company to give the insured thirty-one days notice."

At the risk of seeming importunate, appellant refers to its opening brief at the bottom of page 13 where it was stated:

> "* * * Appellant does not contend and never has contended that the policy lapsed by reason of the foreclosure of the loan against it. On the other hand, it has always been and now is contended by the Appellant that the policy lapsed for failure to pay the premium of November 21, 1946."

Avoidance of the policy by foreclosure of the loan and lapse of the policy for non-payment of premium are two separate and distinct rights of the Company and have so been recognized by many authorities. Appellant has already cited *Pacific Mutual Life Insurance Co. v. Davin,* 5 Fed. (2d) 481, wherein, on page 483, the Court stated:

> "It is admitted that no notice of foreclosure for non-payment of the note was ever sent nor was any required. The policy was not forfeited for the non-payment of the note. What happened was that the premium fell due on the 2nd day of June, 1923. It was not paid at that time nor during the thirty-one days of grace."

See also *Moss et al v. Aetna Life Insurance Company,* 73 Fed. (2d) 339, at Page 340, where the Court stated:

> "It has uniformly been held that the loan and forfeiture provisions do not modify or in any way affect the avoidance of the policy for failure to pay premiums thereon. When there is a failure to pay a premium when it is due the policy becomes void except for the automatically extended insurance but where there is no reserve or loan value in the policy it having been exhausted by the discharge of an indebtedness thereon 'the loan agreement and all incidents * * * become nonexistent—a Chapter finished and closed'." (Citing numerous authorities.)

The question before this Court resolves itself into this: The premium due November 21, 1946 was not paid. The days of grace expired December 21, 1946. The policy then lapsed unless, under the non-forfeiture provisions of the policy, some value remained which would carry the policy beyond the date of death, which occurred January 18, 1947. Here, and for the first time, the status of the loan became material. At this point it was necessary to ascertain what values the insured had in the policy which might be used under the non-forfeiture provisions. Since the insured had elected the automatic loan option, we can discard the other non-forfeiture options. It is also clear that the loan value was not sufficient to pay a full premium, either annual,

semi-annual or quarter-annual. Therefore, the matter was narrowed to the provision contained in Paragraph VI of the policy, which reads:

> "This policy shall remain in force and effect as long as the increasing loan value hereof including the loan value of any dividend additions then in force is sufficient to pay for pro-rata insurance for one additional day on a quarterly premium basis and to secure all existing indebtedness hereon, with interest."

It then became necessary to ascertain the latest date upon which value would remain in the policy to pay for an additional day. For that purpose the insured was credited with the cash value, increase pro-rata to the final day, and he was charged with indebtedness to that date, because the Company is entitled under the above provision, to have security for all existing indebtedness with interest. When that indebtedness, with interest, was deducted on that final day, no loan could be made, because the indebtedness, with interest, to that day exceeded the loan value increased to that day. As shown by Appellant's computations, particularly Exhibit 10, also set forth on page 8 of Appellant's Opening Brief, that final day when all value was consumed was November 25, 1946. However, the days of grace for payment of the premium then past due did not expire until December 21, 1946.

There was no attempt at any time to foreclose the loan or to collect the interest. It was purely and simply a question of ascertaining whether there was any loan value to make an additional loan. The Company was entitled at all times to keep itself secured on existing loans with interest accrued to date.

Appellee attempts to brush off, as inapplicable and not important, all authorities cited by the Appellant in its opening brief. Appellant, therefore, gives consideration to Appellee's citation of authorities concerning interest on the loan and the relevancy of such authorties to the question before the Court.

At the top of page 18 of Appellee's brief, a quotation from *44 C.J.S., Sec. 337, pp. 1290-1291,* is set forth. This sentence, taken out of context, might seem to be pertinent to the issue before the Court; but it is a part of a section dealing with loans on policies and foreclosure thereof rather than with the question of non-payment of premium. Cited by C.J.S. under a note to the Appellee's quotation, are three Pennsylvania cases and an Arkansas case. They are all foreclosure cases. For instance, *New York Life Insurance Co. v. Shively,* 69 S.W. (2d) 392, 188 Arkansas 1044, was the case of a paid up policy on which the loan continued to run until the interest accumulated to the point where the total indebtedness exceeded the cash value of

the policy. This required the foreclosure of the loan in order to avoid the policy; and we agree that, in case of the foreclosure of the loan, there would have to be a due date on loan or interest in order to work the foreclosure. But this is wholly different from the situation which we have in the present case, where all values and obligations are accrued to a fixed date to ascertain what additional loan value may exist.

The second authority cited by Appellee, and the only one which we have found with any language supporting Appellee's contention is the case of *Walsh v. Aetna Life Insurance Company,* 160 A.L.R. 620, 43 Atl. (2d) 102. The head-note quoted purports to support Appellee's position, but analysis of the opinion shows that the case was decided upon a question of fraud and wrongful termination of the policy. Furthermore, the decision was against the insured and his beneficiary and in favor of the Company. Thus the headnote quoted was only *obiter dictum.* Appellant has carefully examined the cases cited as authority by the Pennsylvania court in the Walsh decision. One of the three cases principally relied upon is *Senin, Adm'r. v. Metropolitan Life Insurance Company,* 153 Pa. Super 658, 34 Atl. (2nd) 910. This was an action on two policies of insurance, only the second policy being of interest here. The policy was for paid-up insurance, and the insurer attempted to foreclose for non-payment of a loan plus

interest. The Pennsylvania Superior Court (intermediate court of appeals) decided the issue upon the ground of waiver, in that the company, having the right to demand interest in advance, failed to do so, and therefore waived its right to demand prior to the due date, and, upon non-payment, to cancel the policy. The other principal cases, *Roeser v. National Life Insurance Company,* 115 Pa. Super 409, 175 Atl. 887; *New York Life Insurance Company v. Shively, supra,* relied on in the Walsh decision, are identical. Each involved a paid-up policy, and the insurer sought to foreclose the policy for non-payment of loans plus interest. In each case, the Court found it unreasonable for the insurer to accrue interest, but to refuse to accrue cash value. Therefore, by construing the policies strictly against the company, the interest did not accrue, inasmuch as the cash value did not accrue. Clearly, these cases are not in point, for in the present case, the Appellant waived no rights and carefully accrued cash value and interest at the same time.

It is apparent that Appellee's authorities, such as they are, deal with foreclosure of loans; and the only judicial statement which could support Appellee's contention, namely, the Walsh case, *supra,* was *obiter dictum.* Appellee relies on a portion of one section in Corpus Juris Secundum. It would be well to read further.

See *45 C.J.S., Section 590,* at Page 389:

"The general rule is that a provision for forfeiture or suspension of the policy for default in the payment of premiums or assessments is self-executing and unless the necessity is imposed by statute or the conditions of the contract or by course of dealing, no affirmative act on the part of the insurer such as notice of forfeiture is necessary."

See also *45 C.J.S., Sec. 614,* at page 448:

"A forfeiture for non-payment of premium is not affected by a provision for forfeiture in the event that any indebtedness against the policy equals or exceeds its cash surrender value."

See also *45 C.J.S., Sec. 636,* page 497, where, in dealing with non-forfeiture rights, it is stated:

"However where the right is based on the reserve or loan value of the policy it is lost where such value is exhausted."

See also *45 C.J.S., Sec. 638,* at pages 529 and 530:

"Interest on the loan or advance may be deducted from the fund otherwise available for the purchase of extended insurance. Such interest is deductible to the date of default in the payment of a premium notwithstanding, had there been no default, interest would not have been actually due and payable until some subsequent time."

See also *45 C.J.S., Sec. 640,* page 543, regarding surrender value:

> "In determining the amount of the surrender value insurer generally is authorized to deduct an indebtedness from insured to insurer and this usually includes any indebtedness on account of premium notes, interest or loans."

Appellant has already cited 113 A.L.R. and again calls attention to the cases listed on pages 630 and 631 supporting Appellant's contention that interest must be accrued to the date of the computation of the reserve. Appellant has attempted, through the citators and the American Digest System, to locate some case or cases presenting the exact situation under a similar automatic premium loan provision. Most cases which have arisen under non-forfeiture provisions of polices have been either cases involving surrender of policy for the cash value or cases involving conversion of the reserve into extended or paid-up insurance. A great many of these cases will be found under *Insurance, Key No. 367, (2), C* in the *Fifth Decennial Digest;* but apparently the automatic loan provision is of such recent usage by insurance companies that it has not been very many times in litigation. It is submitted, however, that at the effective date of the non-forfeiture options the computation of the amount of reserve avail-

able either for cash surrender, paid up insurance, extended insurance or for automatic loan to pay premiums must be identical, because, at that time, the Company is entitled to either be paid or secured upon all indebtedness before applying the balance of the reserve to any of these non-forfeiture options. That is the contract, and that is the way the Courts have interpreted it. The case of *Reynolds v. N. W. Mutual Life Insurance Co.*, 298 Mass. 208, 10 N.E. (2d) 70, 113 A.L.R. 603, appears to be the leading case and is the one most often cited upon this question. It is submitted that, if a different rule for computation of reserve applicable to non-forfeiture provisions is to be made in the case of automatic loans, then it will be necessary to distinguish the long lines of authority applying to the computation of reserve values in cases of surrender value, paid up insurance and extended insurance.

It is deemed unnecessary to analyze Appellee's computations set forth on pages 9, 10 and 11 of Appellee's brief. The only substantial difference between them and Appellant's computations is that Appellee does not allow the company credit for accrued interest to the date of the automatic loan. That is where the issue is joined.

One other matter in Appellee's Brief requires reply. At the top of Page 12, Appellee refers to a pink slip in the Company's file and the collection card, on which, in

long hand, appeared "lapsed 1-23-47". These items appear in the dossier of the Company covering this policy. The whole record was brought to the trial and was introduced in evidence. Long hand notations on the copy of the last premium notice and on the collection card referred to the date when this dossier was closed and the date when the policy in question was registered in the register of lapsed policies. It could not, and does not, have any bearing on the contract of insurance or the time of its lapse. The policy contract and the loan agreement fix the rights of both the Company and the insured. A clerk's notation on the collection card would no more establish the rights existing between the parties than would a memorandum made by the insured in his diary or desk calendar. Furthermore, the notice sent by the Company and the letter of January 8, 1947 mailed to the insured clearly show that the Company never at any time considered January 23, 1947 as the date upon which the policy lapsed.

In conclusion, Appellant wishes to make it clear that it does not disagree with the principal of law that, in case of ambiguity, the policy should be liberally construed in favor of the insured. At all times that has been the policy of the Company; but it is believed that there is no ambiguity and that the contract means exactly what is says, namely, that the Company is entitled to be secured for all

indebtedness, with interest. In a business such as that in which the Appellant is engaged, it is necessary to establish definite policies and procedures. The fairest method of dealing with policy holders is to treat every one of them alike. The date of lapse should be definite and certain and not contingent upon hardship or sympathy for either party.

The evidence will show that the Company paid to the Appellee the death benefits under two much larger policies than the one in question. Those policies had been kept alive by the insured; but the Company believes, and a reasonable inference can be drawn from the evidence, that the insured intended to drop the policy involved in this suit when he borrowed the maximum value. It is respectfully submitted that the Company has fairly and correctly dealt with the Appellee, that the Company's interpretation of the contract under the great weight of authority was correct and that the decision of the Trial Court should be reversed.

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